

No. 9813.

IN THE

3

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY, a corporation,

Appellant,

vs.

UNITED STATES,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

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FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY, a corporation,
Appellant,

vs.

UNITED STATES,
Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The opinions of the District Court [R. 45-47] are not reported.

Jurisdiction.

This is a consolidated appeal from judgments entered for the United States in the amounts of \$20,217.82 and \$4,569.52 with interest as provided by law on December 26, 1940. [R. 61-63.] Notices of appeal were filed on March 20, 1941. [R. 63-65.] The jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether certain assessments against the Signal Gasoline Corporation are invalid and subject to attack in these suits against the transferee of the Signal Gasoline Corporation to collect such assessments.

2. Whether these suits are barred by the statute of limitations.

Statutes Involved.

The applicable statutes will be found in the Appendix, *infra*, pages 1 *et seq.*

Statement.

A. PRELIMINARY STATEMENT.

The basic facts indicating the nature of these suits which have been consolidated on this appeal may be briefly stated. Corporation A (Signal Gasoline Company) transferred its assets and liabilities to Corporation B (Signal Gasoline Corporation) in return for B's stock. Corporation A was dissolved and the stock distributed to its shareholders. Corporation C (the appellant Signal Oil and Gas Company) acquired all the stock of B which it liquidated, taking over all of B's assets. Two suits were brought by the United States against C to recover:

(1) Income taxes assessed against B for 1923 and 1924 as the transferee of A. (Case No. 1460-Y.)

(2) Income taxes assessed against B for 1924 as the original taxpayer. (Case No. 1461-Y, formerly 1461-RJ.)

B. DETAILS OF CORPORATE CHANGES AND ACTIVITIES.

On May 1, 1924, pursuant to an agreement between the Signal Gasoline Company, a California corporation, and the Signal Gasoline Corporation, a California corporation, all the assets of the Signal Gasoline Company were turned over to the Signal Gasoline Corporation for 400,000 shares of stock of the Signal Gasoline Corporation, and on September 11, 1924, the Signal Gasoline Company was dissolved; the 400,000 shares received by the Signal Gasoline Company in exchange for its assets and liabilities were distributed to its stockholders. [R. 49-50.]

The Signal Gasoline Company, Incorporated, a corporation now dissolved, was prior to its dissolution a holding company for the stock of the Signal Gasoline Corporation. On July 31, 1928, it owned 419,500 shares of the stock of the Signal Gasoline Corporation, which was 93.22% of the outstanding 450,005 shares of the Signal Gasoline Corporation; the balance of 30,505 shares of the stock outstanding of the Signal Gasoline Corporation (6.78%)¹ was owned by individual stockholders of the Signal Gasoline Company, Incorporated. [R. 50.]

On August 1, 1928, the appellant, Signal Oil and Gas Company, acquired all the assets of the Signal Gasoline Company, Incorporated, which, as noted above, included 93.22% of the stock of the Signal Gasoline Corporation. In November, 1928, the appellant acquired the remaining

¹Throughout the record this is referred to as 4.23%; obviously, a mathematical error.

6.78% of the outstanding stock of the Signal Gasoline Corporation from the individual stockholders of the Signal Gasoline Company. [R. 50-51.]

The Signal Gasoline Corporation was dissolved by court decree on December 12, 1928. This decree of dissolution reads in part as follows [R. 86, 87-88]:

The voluntary application for dissolution of the Signal Gasoline Corporation, a domestic corporation, coming on regularly this day for hearing and determination, the Court finds: * * * 5. * * * that the Board of Directors of said corporation under its Articles of Incorporation consisted of six (6) members and does now consist of six (6) members, namely:

S. B. Mosher
O. W. March
Ross McCollum
H. M. Mosher
C. LaV. Larzelere
R. H. Green.

Wherefore, it is Ordered, Adjudged and Decreed, that said Corporation, the Signal Gasoline Corporation be, and the same is, and is hereby declared to be dissolved. It is further Ordered and Decreed that said S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and R. H. Green are entitled to be, and are by the Court herein appointed, trustees for the stockholders of said corporation, with power and direction to settle all the affairs of said corporation, and to distribute and convey all the property of said corporation to each of said stockholders, in proportion to the number of shares owned and held by said stockholders when said distribution and conveyance shall be made. * * *

On December 14, 1928, all of the assets of the Signal Gasoline Corporation were conveyed to the appellant subject to all liabilities, including taxes, of the Signal Gasoline Corporation. [R. 51.] This conveyance reads in part as follows [R. 83, 84]:

That whereas, on the 12th day of December, 1928, the Superior Court of the State of California in and for the County of Los Angeles made and filed its decree dissolving the Signal Gasoline Corporation,
* * * Now therefore, in consideration of the premises S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and E. H. Green, as Trustees for the stockholders of said Signal Gasoline Corporation, a dissolved corporation, and also in their individual capacities, do hereby assign, transfer, grant, convey, deliver and distribute to said Signal Oil and Gas Company, a Delaware corporation, all of the assets, business and property * * * possessed by said dissolved corporation at the time of its dissolution, * * * and subject to all outstanding obligations and liabilities thereon, and subject to the payment of income taxes that may be due to the United States Government covering operations of said dissolved corporation during the current year and all sums that may be found due covering income taxes for previous years. * * *

By reason of this dissolution and distribution the Signal Gasoline Corporation was and is left without any money, assets or property to pay the taxes hereinafter shown to be due the United States. [R. 56.] The assets so acquired by the appellant were far in excess of such taxes. [R. 57.]

At all times involved substantially the same persons were officers and directors or statutory trustees of the Signal Gasoline Corporation as were the officers and directors of the appellant, and officers and directors of the Signal Gasoline Company, Incorporated. [R. 57.]

In addition to the acts subsequently described, the statutory trustees of the Signal Gasoline Corporation after its dissolution, who were those persons who were the officers and directors of the appellant, persisted in transacting business affairs of the dissolved corporation in the name of the Signal Gasoline Corporation and in particular in the negotiations with the United States of America regarding the tax liabilities of the Signal Gasoline Corporation. [R. 58.]

C. FACTS CONCERNING ASSESSMENTS AGAINST SIGNAL GASOLINE CORPORATION.

The details concerning the assessments against the Signal Gasoline Corporation are given under Argument I. The following general facts may here be noted.

In October, 1928, the Commissioner of Internal Revenue proposed a tax deficiency against the Signal Gasoline Corporation for the year 1923 as transferee of the Signal Gasoline Company. [R. 5-6.] In December, 1929, a similar tax deficiency was proposed for the year 1924. [R. 6.] The Signal Gasoline Corporation through its trustees prosecuted petitions for redetermination of these taxes by the Board of Tax Appeals. The Board sustained the Commissioner's determinations, 25 B. T. A. 532, and assessments were accordingly made on Septem-

ber 10, 1932. [R. 52-53.] Suit was instituted on September 9, 1938, against these appellants to collect the assessments. [R. 2-9.]

In September, 1929, the Commissioner of Internal Revenue proposed a tax deficiency against the Signal Gasoline Corporation as an original taxpayer for the year 1924. Through its trustees it prosecuted a petition for redetermination of the taxes by the Board of Tax Appeals. The Board sustained the Commissioner's determination, 25 B. T. A. 861, and an assessment was accordingly made on October 1, 1932. [R. 54-56.] Suit was instituted on September 9, 1938, against these appellants to collect the assessment. [R. 9-15.]

The District Court entered judgment for the United States in both cases [R. 61-63] and these consolidated appeals were thereafter taken. [R. 63-65.]

Summary of Argument.

The assessments against the Signal Oil Corporation are valid. They were entered pursuant to decisions of the Board of Tax Appeals in proceedings instituted and prosecuted by the corporation through its duly authorized trustees.

The statute of limitations does not bar these suits. Tax assessments may be collected by proceedings in court commenced within six years after the assessments were made. The assessments against the Signal Gasoline Corporation were entered on September 10, 1932, and October 1, 1932. These suits were instituted on September 9, 1938.

ARGUMENT.

I.

The Assessments Against the Signal Gasoline Corporation Were Valid and May Not Be Questioned by the Appellant.

These suits are based upon three assessments made in 1932 against the Signal Gasoline Corporation, the corporation whose assets were received by the appellant. The validity of the assessments is questioned by the appellant. The facts concerning them are as follows:

A. ASSESSMENTS AGAINST SIGNAL GASOLINE CORPORATION AS TRANSFEREE OF SIGNAL GASOLINE COMPANY.

On October 2, 1928, the Commissioner of Internal Revenue mailed a letter to the Signal Gasoline Corporation proposing a tax deficiency against that corporation as transferee of the Signal Gasoline Company in the amount of \$468.33 for the year 1923. [R. 52, 74.] An appeal from this proposed deficiency was taken in the name of the Signal Gasoline Corporation and was docketed with the Board of Tax Appeals on November 19, 1928 (Docket No. 41532). [R. 52, 75.]

On December 12, 1928, a Decree of Dissolution was entered by the Superior Court of the State of California dissolving the Signal Gasoline Corporation upon its own application. This decree also ordered that [R. 87-88]:

* * * S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and R. H. Green are entitled to be, and are by the Court herein appointed, trustees for the stockholders of said corporation, with power and direction to settle all the

affairs of said corporation and to distribute and convey all the property of said corporation to each of said stockholders, in proportion to the number of shares owned and held by said stockholders when said distribution and conveyance shall be made
* * *

On December 28, 1929, the Commissioner of Internal Revenue mailed a letter to the Signal Gasoline Corporation proposing a tax deficiency against that corporation as transferee of the Signal Gasoline Company in the amount of \$2,672.53 for the period ended September 11, 1924. [R. 52, 74.] An appeal from this proposed deficiency was taken in the name of the Signal Gasoline Corporation and was docketed with the Board of Tax Appeals on February 24, 1930 (Docket No. 47620). This petition in its first paragraph stated that "The petitioner is a dissolved corporation acting through its statutory trustees." The verification on the petition was signed by six persons and stated that they were "the statutory trustees of Signal Gasoline Corporation, a dissolved corporation." [R. 52, 75.]

Both petitions for redetermination above referred to were signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioners. [R. 75.]

On February 16, 1932, the Board of Tax Appeals promulgated a single opinion with respect to both petitions. (25 B. T. A. 532.) The petitioner was described as "a dissolved California corporation, acting through its statutory trustees" and the opinion recited that "The petitioner concedes the tax liability [of the Signal Gasoline Company], but contends that it is not liable at law or in equity for the deficiency asserted." (25 B. T. A. 533.) The

Board concluded that transferee liability existed, and accordingly, no appeal having been taken, an assessment was made on September 10, 1932, against the Signal Gasoline Corporation in the amount of \$468.33 plus interest of \$227.96 for the taxable year 1923 and \$2,672.53 plus interest of \$1,200.70 for the period ended September 11, 1924. [R. 52-53, 88-90.]

B. ASSESSMENT AGAINST SIGNAL GASOLINE CORPORATION FOR ITS OWN 1924 TAXES.

The Signal Gasoline Corporation filed its income tax return for the calendar year 1924 on or about May 13, 1925. [R. 53, 76.] On December 3, 1928, it signed and filed a consent extending the time for assessing any income taxes due for the year 1924 until December 31, 1929. [R. 54, 76, 91.]

On December 28, 1929, the Commissioner of Internal Revenue mailed a letter to the Signal Gasoline Corporation proposing a tax deficiency against that corporation in the amount of \$14,137.05 for the period May 1 to December 31, 1924. This letter also proposed an assessment of other additional tax liabilities for the calendar years 1925 and 1926 which are not now in issue. [R. 54, 76-77.] An appeal from these proposed deficiencies was taken in the name of the Signal Gasoline Corporation and was docketed with the Board of Tax Appeals on or about February 24, 1930 (Docket No. 47621). This petition, signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioners, in its first paragraph stated that "The petitioner is a dissolved California corporation acting through its statutory trustees." The petition was verified by the six trustees. [R. 55-56, 77-78.]

On March 14, 1932, the Board of Tax Appeals promulgated its opinion with respect to this petition. (25 B. T. A. 861.) The petitioner was described as "a dissolved California corporation acting through its statutory trustees." (25 B. T. A. 862.) The Board concluded that the proposed deficiencies were correct, and accordingly, no appeal having been taken with respect to the year 1924, an assessment was made on October 1, 1932, against the Signal Gasoline Corporation, in the amount of \$14,137.05 plus interest of \$6,080.77 for the period May 1 to December 31, 1924. [R. 56, 78, 97-99.]

The appellant urges that because the Signal Gasoline Corporation was dissolved in December, 1928, the proceedings before the Board of Tax Appeals and the subsequent assessments were null and void. The decisions of this and other courts establish that this contention is erroneous.

The Signal Gasoline Corporation was a California corporation. Prior to the general statutory revision of the California corporation law in 1931, Section 400 of the California Civil Code, as amended in 1921 [Appendix, *infra*], provided:

Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full powers to settle the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation,

and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands. * * *

When the Signal Gasoline Corporation was dissolved in 1928, a court order was entered as heretofore noted naming six trustees "with power and direction to settle all the affairs" of the corporation. All of the proceedings before the Board of Tax Appeals were prosecuted by these trustees who were clearly acting within the authority granted by the court. It therefore follows that such proceedings and the ensuing assessments adjudging the liabilities of the Signal Gasoline Corporation were valid. This conclusion is supported by the decision of this Court in *McPherson v. Commissioner*, 54 F. (2d) 751. There, a California corporation was dissolved in June, 1920. The trustees thereafter filed with the Commissioner of Internal Revenue a waiver of the time prescribed by law for making assessment of taxes against the corporation, and subsequently, within the proper time as extended, such assessment was made. Thereafter, in an action before the Board of Tax Appeals involving the transferee liability of these trustees individually they urged (p. 752):

* * * (1) That the commissioner was not authorized under the law to make the deficiency assessment against a corporation that had been dissolved. (2) That the waiver extending the time within which the assessment might be made was invalid.

This court rejected both contentions saying (pp. 752, 753):

Upon the dissolution of the corporation, the petitioner, together with Barthel, as directors of the corporation, became trustees, with the power and duty to adjust any unsettled affairs of the corporation; to collect its receivables and to pay its debts. Section 400 of the Civil Code of California, as it read during all of the time important to these tax proceedings, contained the following provisions:

* * * * *

Those provisions do not limit the period during which the trustees shall continue to act. Hence, the implication is plain that they shall continue to act so long as any of the affairs of the dissolved corporation remain unsettled. *United States v. Laflin* (C. C. A.), 24 F. (2d) 683; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. We find no reason to distinguish a case where trustees are acting to liquidate corporate affairs under the provisions of the California statute from those cases where liquidators are provided for to act in the corporate name. The corporation here concerned became liable for the tax during the year when it was functioning under its charter. That tax the commissioner was entitled to assess in some form, and whether he designated the corporation by name, as though it were still fully alive, or designated its estate under the term "a dissolved corporation," or designated it as "a dissolved corporation in the hands of trustees" seems to suggest a matter of form only and not one attended by substantial differences. It was necessary that the total amount of the tax which accrued against the corporation during its active existence be ascertained, in order that the tax might be

collected and the assets followed into whosoever hands they might be found. The fixing of the tax charge as it had accrued against the corporation was a necessary prerequisite to the ascertainment of the proportionate amounts due from the transferees of the assets. The former directors, acting as trustees, as the law provided they should act, were legally bound to take notice of the assessment proceedings of which they were given notice, following the return which they made to the commissioner.

* * * * *

The validity of proceedings before the Board of Tax Appeals by a dissolved corporation through its trustees was also questioned in *Buzard v. Helvering*, 77 F. (2d) 391 (App. D. C.). There, the corporation had been dissolved in 1922 and subsequently a petition before the Board of Tax Appeals was filed for the corporation by an attorney authorized to do so by the corporate trustees. In sustaining the jurisdiction of the Board of Tax Appeals the court said (pp. 394, 395):

Placing themselves squarely on the California law, as interpreted and pronounced by the Supreme Court of California in the Crossman case, petitioners say that, since the Navarro Lumber Company had been legally dissolved in 1922, it could not thereafter be served with process, could not appear, and could not itself admit anything, nor authorize anyone to do so for it. That, in these circumstances, all that was done in its behalf by its trustees in the matter of the appeal to the Board of Tax Appeals was a nullity, and there-

fore had no effect, and could have no effect, in extending the periods of limitations. * * * But, in our view, petitioners' premise is not sustainable on either of two grounds.

* * * * *

In taking the appeal, petitioners set out the authority on which they acted. They speak of themselves as the trustees of the lumber company "now in process of liquidation" and point to the statute of California for their authority to act. By reference to that statute (Civil Code, §400 as amended by St. Cal. 1921, c. 383, p. 574) we find that they have power to settle the affairs of the corporation, collect and pay outstanding debts, to sue and to be sued in relation to the debts and property of the corporation, and that they shall be jointly and severally liable to creditors to the extent of any property that shall come into their hands. It was in recognition of these duties and responsibilities that they filed the appeal. We think it cannot be urged that they were without authority, or the Board without jurisdiction. * * *

The case at bar does not involve the situation as in *G. M. Standifer Const. Corp. v. Commissioner*, 78 F. (2d) 285 (C. C. A. 9th), where an Oregon corporation, fully dissolved and without either statutory or judicially designated trustees, attempted nevertheless to litigate as a live corporation.² In the case at bar, to the contrary, the pro-

²In *California Iron Yards Co. v. Commissioner*, 47 F. (2d) 514, 516, this Court referred to a California corporation dissolved in 1921 as "one of suspended animation," citing 7 Cal. Jur. 640; *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816; *Rossi v. Caire*, 186 Cal. 544, 199 Pac. 1042; *Ransomme-Crummey Co. v. Superior Court*, 188 Cal. 393, 205 Pac. 446.

ceedings before the Board on behalf of the corporation were prosecuted by its duly authorized trustees. Had it so desired the corporation could have appealed to this Court for a review of the Board's decisions. As a matter of fact, it did appeal to this Court from the previously mentioned Board opinion in 25 B. T. A. 861 in so far as it determined the corporation's tax liabilities for 1925 and 1926. This Court reversed the Board's decision on the merits and remanded the case for recomputation. (*Signal Gasoline Corporation v. Commissioner*, 66 F. (2d) 886.) The Board made such recomputation, 30 B. T. A. 568. Again the corporation effected an appeal to this Court at which time the Board's action was affirmed.

Signal Gasoline Corp. v. Commissioner, 77 F. (2d) 728.³

The appellant's brief (p. 20) cites four decisions of the Board of Tax Appeals dealing with the effect of corporate dissolution upon Board proceedings. They are not in point since none of them was an action prosecuted by the properly constituted trustees.⁴ Actually, the views of the Board of Tax Appeals with respect to dissolved California

³In both appeals, the counsel for the Signal Gasoline Corporation was the present attorney for the appellant.

⁴*Sanborn Brothers v. Commissioner*, 14 B. T. A. 1059, was a purely officious suit by a stockholder of a dissolved California corporation. *S. Hirsch Distilling Co. v. Commissioner*, 14 B. T. A. 1073, concerned a Missouri corporation totally dissolved without any person being authorized to maintain an action. The dismissal in *Iberville Wholesale Grocery Co. Ltd. v. Commissioner*, 15 B. T. A. 645, was entered because of lack of evidence as to the trustee's authority, but the case was reinstated when such authority was shown, 17 B. T. A. 235. *Union Plate & Wire Co. v. Commissioner*, 17 B. T. A. 1229, was also based upon the absence of a person authorized to act for the corporation.

corporations are in accord with the Government's views here expressed. See

Buzard v. Commissioner, 28 B. T. A. 247.

Apart from the foregoing reasons, it is clear that the appellant should not now be permitted to question the validity of the assessments made against the Signal Gasoline Corporation. The appellant as sole stockholder of that corporation acquired all its assets and, as will be shown hereafter, became liable at law as well as in equity for its unpaid taxes. The trustees of the Signal Gasoline Corporation were the officers and directors of the appellant and their actions before the Board of Tax Appeals were for the benefit of and in order to protect the interests of the appellant. In such circumstances, the appellant ought not to be permitted to assail the validity of the Board proceedings and the assessments against the Signal Gasoline Corporation. It has been so held in similar situations.

Warner Collieries Co. v. United States, 63 F. (2d) 34 (C. C. A. 6th);

Buzard v. Helvering, 77 F. (2d) 391 (App. D. C.).

II.

The Statute of Limitations Does Not Bar These Actions.

The appellant received the assets of the Signal Gasoline Corporation subject to the express condition that it assume payment of all taxes owing by the transferor. It thus became liable at law not only for the direct tax liabilities of the Signal Gasoline Corporation (*American Equitable Assur. Co. of New York v. Helvering*, 68 F. (2d) 46 (C. C. A. 2nd); *Helvering v. Wheeling Mold & Foundry Co.*, 71 F. (2d) 749 (C. C. A. 4th)), but also for the tax liabilities of that corporation as transferee of the Signal Gasoline Company.

Continental Baking Co. v. Helvering, 75 F. (2d) 243 (App. D. C.).

The appellant also became liable in equity for such taxes since as sole stockholder of the Signal Gasoline Corporation it acquired all the assets of that corporation.

United States v. Updike, 281 U. S. 489;

Phillips v. Commissioner, 283 U. S. 589;

Pann v. United States, 44 F. (2d) 321 (C. C. A. 9th).

Prior to the Revenue Act of 1926 such transferee liability could only be enforced by an action at law or by a bill in equity. That act, however, by Section 280(a)(1) provided that transferee liability could be enforced in the same manner and subject to the same limitations as that

of any delinquent taxpayer. Section 280(a)(1) reads as follows:⁵

(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * *

The time within which assessments could be made against transferees was specified in Section 280(b)(c) and (d). [Appendix, *infra*.] It will be observed that these subsections which followed Section 280(a) are concerned with limitations upon assessments and not upon collections. As the Supreme Court has stated, “the suc-

⁵Section 280 of the Revenue Act of 1926 is applicable to taxes imposed by the Revenue Act of 1926 and prior acts. Essentially similar provisions applicable to taxes imposed by subsequent Revenue Acts may be found in Section 311 of the Revenue Acts of 1928, 1932, 1934, 1936, 1938 and Section 311 of the Internal Revenue Code. (See, also, amendments effected by Section 814 of the Revenue Act of 1938.)

ceeding paragraphs contain provisions of limitation in respect of assessment, they contain none in respect of collection.”

United States v. Updike, 281 U. S. 489, 494.

In order to ascertain the period of limitation upon collection against a transferee it is necessary to refer to Section 280(a) which states that the liability of a transferee shall be “* * * collected * * * in the same manner and subject to the same provisions and limitations as in the case of a deficiency in tax imposed by this title (including * * * the provisions authorizing * * * proceedings in court for collection * * *).” This section therefore incorporates the limitation provision which is normally applicable to all taxpayers, *i. e.*, Section 278(d). This interrelation of Section 280(a) and Section 278(d) was expressly recognized in *United States v. Updike, supra*. In that case the Court concluded (p. 494) that “the effect of the language above quoted from Section 280 is to read into that section and make applicable to the transferee equally with the original taxpayer, the provision of Section 278(d) in relation to the period of limitation for the collection of a tax.”

Section 278(d) of the Revenue Act of 1926 provides:

Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding

in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

Thus, a six-year limitation was placed upon proceedings in court to collect tax assessments. The applicability of this limitation to the consolidated cases at bar will now be discussed.

Case No. 1461-Y (Originally 1461-R J)—This action seeks to recover from the appellant the amount of taxes assessed for the year 1924 against the Signal Gasoline Corporation as an original taxpayer. The assessment was made on October 1, 1932. [R. 56.] This suit was instituted September 9, 1938. [R. 15.] Since the action was brought within six years after the assessment against the Signal Gasoline Corporation, it was timely.

Revenue Act of 1926, Secs. 280(a) and 278(d).

See

United States v. Updike, *supra*;

United States v. Adams, 92 F. (2d) 395 (C. C. A. 5th).

Case No. 1460-Y—This action seeks to recover from the appellant the amount of taxes for the years 1923 and 1924 assessed against the Signal Gasoline Corporation as transferee of the Signal Gasoline Company. These assessments were made on September 10, 1932. [R. 53.] This suit was instituted September 9, 1938. [R. 9.] Since the

action was brought within six years after the assessments against the Signal Gasoline Corporation, it too was timely.

Revenue Act of 1926, Secs. 280(a) and 278(d).

See

City Nat. Bank v. Commissioner, 55 F. (2d) 1073
(C. C. A. 5th).

The only difference between these two actions is that the former is to recover upon an assessment against the Signal Gasoline Corporation for an original tax liability and the latter is to recover upon an assessment against the Signal Gasoline Corporation for a transferee tax liability. The Revenue Act makes no distinction between these two situations and establishes a single rule of limitation with respect to both. If the liability of a transferee is not made the subject of an assessment then suit for collection from the transferee may be instituted within six years after the assessment was made against the transferor. (See *United States v. Adams, supra.*) If the liability of the transferee is reduced to an assessment, then suit for collection from the transferee may be instituted within six years from the date of that assessment.⁶ See

City Nat. Bank v. Commissioner, supra.

Case No. 1461-Y presents no problem. The Signal Gasoline Corporation was liable for 1924 taxes. The assessment for such taxes was timely made and within six

⁶The appellant in fact concedes that a suit against a transferee can be instituted within six years after a transferee assessment has been made against him. It views the assessment of October 1, 1932, as in effect a transferee assessment against the trustees of the Signal Gasoline Corporation and admits (Br. 28) that "The Government had six years from October 1, 1932, to sue the trustees * * *."

years thereafter suit for collection was instituted against the appellant.

Case No. 1460-Y presents a slight variation from the usual case since the tax assessments against the Signal Gasoline Corporation were for transferee liabilities. It is equally clear, however, that the six-year limitation applies. Had the Signal Gasoline Corporation retained assets, the Commissioner of Internal Revenue could have sued that corporation within six years after the transferee assessments were made against it. To urge that this period of collection can be reduced by a voluntary transfer of the assets of the Signal Gasoline Corporation to its sole stockholder is to urge a patent form of tax evasion. The Signal Gasoline Corporation with respect to its transferee liabilities was a "taxpayer." The Supreme Court has said that "it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property * * * is subjected to the burden." (*United States v. Updike, supra*, p. 494. Cf. *City of New York v. Feiring*, decided by the Supreme Court May 26, 1941.) The appellant as transferee of the Signal Gasoline Corporation was a transferee of a taxpayer within the meaning of Section 280(a), and therefore could be sued for the collection of any assessment which had been made within six years against the Signal Gasoline Corporation.

The appellant's case rests upon *United States v. Continental Bank*, 305 U. S. 398. In that case in 1926, James Duggan petitioned the Board of Tax Appeals to redetermine certain proposed tax deficiencies asserted to be due from him as transferee of corporate assets. In March, 1929, he died but no personal representative of the testator or other person applied for substitution of a party to carry

on the proceeding and none was ordered. The Board's order sustaining the Commissioner was entered in January, 1931. On February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan. The administrator of his estate distributed the assets to various beneficiaries including the Continental National Bank and Trust Company as trustee. The United States thereafter instituted suit against these beneficiaries to recover the amount of the tax. In denying the Government's right to a recovery, the Supreme Court (Mr. Justice Stone and Mr. Justice Black dissenting) said that the statute was not broad enough to impose on "* * * testamentary transferees of the estate of the testator * * * any liability on account of the assessment against the testator" (p. 404) and moreover concluded that for stated reasons the assessment against the testator had not been made in time.

It seems clear that the decision in the *Continental* case has no bearing on case No. 1461-Y. That suit is simply a suit against a transferee to recover an original tax liability of the transferor which had been assessed against the transferor. It is not a suit against a transferee of a transferee as the appellant urges on the theory that the assessment was in effect against the trustees as transferees of the Signal Gasoline Corporation. The assessment was a determination of the tax liability of the Signal Gasoline Corporation⁷ which under Section 281(b) of the Revenue

⁷See *McPherson v. Commissioner*, 54 F. (2d) 751, 752 (C. C. A. 9th); *United States v. Russell*, 22 F. (2d) 249, 251 (C. C. A. 5th).

Act of 1926 was to be collected from the assets of the corporation. Those assets were taken over by the appellant and this suit instituted against it within six years from the date of the assessment.

Nor is there any validity in the assertion that the *Continental* case controls in case No. 1460-Y. Here, the assessments against the Signal Gasoline Corporation were made timely, and whatever may be the propriety of denyiny recovery against the testamentary transferees of an individual taxpayer does not apply where the transferee is a corporation which as sole stockholder voluntarily acquired the assets of another corporation. This is particularly true where as here there was an express assumption of the tax liabilities of the transferor. The *Continental* case does not establish the broad ruling contended for by the appellant and no valid reason has been suggested for extending it beyond its facts. Certainly, it should not be extended to cases involving the acquisition of corporate assets by its sole stockholder, another corporation.

Where justice requires it the courts will not be bound by the fiction of the corporate entity.⁸ Here, the transferor and the transferee were separate entities in legal form only. The appellant was the sole stockholder of the Signal Gasoline Corporation. Its officers and directors were the trustees of the Signal Gasoline Corporation. In the transfer of the assets of the Signal Gasoline Corporation to the

⁸This principle has already been applied to the appellant in other litigation. See *Wiethoff v. Refining Properties, Ltd.*, 8 Cal. App. (2d) 64, 68.

appellant, there was at no time any change in either beneficial interest or control. It is therefore particularly appropriate that this Court should not permit the appellant to maintain before it the legal fiction of two distinct entities for the purpose of setting up the defense of the statute of limitations and to avoid the payment of taxes justly due. Cf.

Higgins v. Smith, 308 U. S. 473.

Conclusion.

It is submitted that the decision of the District Court was correct and therefore that the judgment should be affirmed.

Respectfully submitted,

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July 22, 1941.

APPENDIX.

Statutes.

Revenue Act of 1926, c. 27, 44 Stat. 9:

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

Sec. 277. (a) Except as provided in section 278—

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

* * * * *

Sec. 278. * * *

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable

thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

* * * * *

CLAIMS AGAINST TRANSFERRED ASSETS.

Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suit for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods,—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter. (As amended by Sec. 505 of the Revenue Act of 1928.)

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a

transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

FIDUCIARIES.

Section 281. * * *

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

* * * * *

California Civil Code as amended in 1921 (Kerr's Biennial Supplement, Annotated (1921), p. 465):

§400. DIRECTORS TRUSTEES OF CREDITORS, ON DISSOLUTION. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full powers to settle the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation, and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands. * * *